cable companies were likely to drop if the rules were adopted -- including Lifetime, VH-1, Court TV, C-Span, and CNN's Headline News. Customers were then asked how they would react if their cable companies dropped those channels "in order to lease to an independent company . . . channels showing mostly home shopping or program length infomercials." The leading question was: "[w]ould you be very angry, pretty angry, not too angry or not at all angry?"[70/] Similarly, the customer survey for Continental asked the respondents to rate "how appealing" leased access programming was to them, after asserting that such programming "[t]ypically . . . focuses on various topics such as infomercials, home shopping, and ethnically oriented programs." As in TCI's survey, the suggestion was that the Commission's proposed rules would eliminate such popular networks as Headline News, Lifetime, and Comedy Central.[71/] The only thing that surveys of this kind prove is that their authors are reluctant to obtain objective data on issues central to their claims.

[70/] TCI, Attachment G at 5.

[71/] Continental, Attached Survey.

V. MINOR MODIFICATIONS AND APPROPRIATE SAFEGUARDS WILL PREVENT MANIPULATION OF THE COST/MARKET FORMULA.

In addition to the protections that ValueVision sets forth in its comments, we urge the Commission to consider the proposals of several other commenters discussed below.[72/]

A. Presumption against bumping leased cost channels

To guard against manipulation, ValueVision has proposed that the Commission adopt its proposed presumption against an operator's designating or bumping channels other than its lowest opportunity cost channels.[73/] Operators could rebut that presumption by demonstrating, for example, that a low opportunity cost channel had particularly high ratings. The Game Show Network proposes that the Commission allow operators to designate only those channels that are among the system's lowest third in terms of opportunity costs.[74/] This proposal would likewise restrict an operator's ability to manipulate its designation of

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72/ ValueVision supports the proposal by several commenters that the Commission forbid a cable operator from requiring leased access programmers to provide payment for liability insurance, naming the operators as beneficiary, in order to gain access. See, e.g., Comments of Lorilei Communications, Inc. at 2; Comments of Leased Access Producer Mark Kliem at 4.

We also urge the Commission to make clear that leasing a channel does not permit the operator to retain independent rights in that channel -- e.g., the use of the vertical blanking interval.

73/ ValueVision at 5; see also CME at 10-11 (proposing a similar presumption)

74/ Comments of the Game Show Network, L.P. at 8-9.

channels under the proposed formula in order to maximize leased access rates, while allowing flexibility not to bump popular networks.[75] See Notice ¶ 76.

B. Prohibition on migration

Several commenters express concern that adopting the cost/market formula will encourage commercial programmers who can otherwise successfully negotiate carriage to migrate to leased access channels, contrary to the congressional intent that leased access serve as an outlet for those that cannot otherwise obtain carriage.[76] We support CME's proposal that the Commission adopt safeguards to prohibit migration.[77] For instance, the Commission might prohibit the migration of programmers that have previously successfully negotiated carriage, unless such programmers fail to obtain renewal on similar terms.

C. Alternative cost formula

Parties on both sides of the leased access debate have noted the complexity of the proposed cost/market formula. To address these concerns, the Commission should consider adopting a

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[75] Several commenters urge the Commission to forgo altogether a requirement that operators designate leased access channels in advance, due to the potential economic harm to the programmers so designated. See A&E et al. at 14, 57; Comcast at 19. The suggestion here is apparently that those designated may not be bumped -- a result that would not be permitted under the proposed rules.

[76] E.g. CME at 13-14; NCTA at 17; Travel Channel at 9-11.

[77] See CME at 13.

benchmark rate with an opportunity to charge higher rates based upon a demonstration under the cost/market formula.[78/]

As the Notice indicates (at ¶¶ 21, 62), ValueVision previously proposed a rate for leased access of somewhere between 7 and 12 cents per subscriber per month. Such a rate is easy to understand and administer and difficult to evade or manipulate. It is also essentially a form of "opportunity cost" much like the Commission's formula, because it is based upon the documented revenue actually provided to cable operators by two cable channels -- HSN and QVC -- already widely carried by them. Since HSN and QVC may not actually be the least profitable channels carried by cable operators, ValueVision's proposed rate probably overstates the price needed to ensure recovery of cable operator's opportunity cost.[79/] And it uses a monopsony price. But the simplicity and predictability of such a rate model make

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[78/] To the extent that small cable operators criticize the application of the cost formula to their systems (e.g. Comments of the Small Cable Business Association), such a solution would presumably satisfy them.

[79/] The Commission could adopt this estimate based on the available evidence, much as in the going-forward proceedings. There, it adopted a 20 cent flat rate mark-up as its "best estimate of the average amount by which operators in a competitive environment would adjust rates for the addition of a new channel." Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, 10 FCC Rcd 1226 (1994), recon. 10 FCC Rcd 3225, further recon. 11 FCC Rcd 785 (1995).

it attractive in light of the statutory goal of eliminating uncertainty in leased access terms and conditions.[80/]

The Commission's only basis thus far for rejecting ValueVision's proposal is its view that -- despite the contrary premise of the present rule[81/] -- "home shopping programmers should [not] be treated differently from other programmers." Notice ¶ 62. ValueVision's proposal, however, need not be limited to home shopping programmers. Cable operators could be allowed to make a cost showing under the Commission's formula to justify a departure from the 10 cents per month per subscriber fee. As with subscriber rates, creating such a rebuttable presumption would require the party possessing the cost information, in this case the cable operator, to justify a departure from the Commission's benchmark rate for leased access.

VI. ADOPTION OF AN ADDITIONAL TRANSITION PERIOD OF ANY SORT WOULD BE INCONSISTENT WITH THE COMMISSION'S STATUTORY MANDATE.

Many cable industry commenters request that the Commission grandfather programming that is currently being offered.[82/] They point to the grandfathering provision of the 1984 Cable Act, exempting operators from the leased access provisions with regard to "any service actually being provided on

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80/ See Senate Report at 31-32.

81/ See 47 C.F.R. § 76.970(f)(2).

82/ See, e.g., Rainbow at 11-13; USA at 7; Viacom at 10.

July 1, 1984." 47 U.S.C. § 532(b)(1)(E). However, that protection for existing programmers obviously ran its course long ago. There has been far too much grandfathering of far newer programmers already.

Moreover, as ValueVision noted in its opening comments, these new programmers have been on clear notice of the requirements of leased access for many years now.[83] As C-SPAN itself acknowledges, cable operators and the programmers that they carry have "assumed the risk" that they will be bumped.[84]

As many programmers also recognize, a number of them obtained carriage due to the Commission's going-forward regime.[85] Such programmers have little standing to challenge the prior determination of Congress to provide a "genuine outlet" for leased access programmers who have been suffering serious competitive injuries from being denied that statutory right.

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[83] When the Commission adopted its initial rate-capping scheme, it made clear that it would be refining its leased access rules. Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, 8 FCC Rcd 5631, 5936 ("Rate Order"), recon. 9 FCC Rcd 1164 (1993), further recon. 9 FCC Rcd 4119 (1994), aff'd in part sub nom. Time Warner Entertainment Co. v. FCC, 56 F.3d 151 (D.C. Cir. 1995).

[84] C-SPAN at 9. In light of the regulatory environment in which they elected to obtain and renew cable franchises, the relatively small portion of their channel capacity devoted to leased access, and the character of the leased access requirement as a traditional common carrier-like regulation of monopoly providers, the takings claims of the cable industry (e.g. NCTA at 15-17; TCI at 39-40) are quite far fetched indeed.

[85] See A&E et al. at 37-38; Cable Television Operators at 26; USA at 3.

Several commenters urge the Commission to establish that operators need not abrogate existing carriage contracts in order to provide capacity for leased access programming.[86] However, operators often have a right to end such contracts on short notice and switch out cable programmers on a regular basis. As NCTA itself has acknowledged, "[c]able programmers . . . are dropped as cable systems, over time, . . . continue to make changes in the mix of programming offered to their subscribers."[87] In any event, operators and programmers who entered into such contracts after 1992 had no reasonable basis for believing that the Commission would not comply with its statutory mandate to make leased access a "genuine outlet."

VII. REQUIRING THAT LEASED ACCESS CHANNELS BE PLACED ON PROGRAMMING TIERS WITH THE HIGHEST SUBSCRIBER PENETRATION IS CONSISTENT WITH CONGRESSIONAL INTENT.

Several commenters suggest that the Commission should not or cannot require operators to place leased access channels on a programming tier.[88] Consistency is not their strong point. While NCTA relies extensively on the legislative history of the

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[86] See, e.g., Discovery at 14; Travel Channel at 19-21; Viacom at 10.

[87] Brief for Appellant National Cable Television Association, Inc., at 20 n.5, Turner Broadcasting System, Inc. v. FCC, No. 95-992 (U.S. filed Apr. 26, 1996).

[88] See, e.g., NCTA at 28-31; Rainbow at 13-15; TCI at 21-25; Travel Channel at 22; Viacom at 11-12.

1984 Cable Act, it argues that the Commission should not rely on the legislative history of the subsequent 1992 Act.

NCTA would ignore the fundamental purpose of the 1992 leased access provisions. Considering it "vital that the FCC use its authority to ensure that these [leased access] channels are a genuine outlet for programmers," Congress directed the Commission to ensure that leased access "programmers are carried on channel locations that most subscribers actually use."[89] Allowing operators to force leased access programmers to offer their services a la carte, as several commenters propose,[90] would limit the programmers' access to cable subscribers, thereby defeating the purposes of the 1992 amendments.

VIII. REQUIRING OPERATORS TO SELECT PROGRAMMERS ON A FIRST-COME-FIRST-SERVED BASIS WOULD PREVENT THEM FROM IMPERMISSIBLY CONSIDERING CONTENT IN ALLOCATING CHANNEL CAPACITY.

Commenters who oppose a requirement that operators select leased access programmers on a first-come-first-served basis complain that such a rule would preempt cable operators' ability "to consider the nature of the programming and its effect on the operation of the cable system."[91] That assertion is itself a strong argument for adopting such a regulation. The Act

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[89] Senate Report at 79.

[90] Comcast at 10; Rainbow at 15.

[91] NCTA at 31-32; see also Outdoor Channel at 36; TCI at 36-37.

expressly forbids a cable operator to "exercise any editorial control over" leased access programming or "in any other way [to] consider the content of such programming."[92] Allowing cable operators to discriminate in program selection would thwart the ability of some leased access programmers to obtain carriage without regard to the content of their programming.[93] For instance, TCI has already suggested that it would favor certain sorts of programming over "additional shopping channels,"[94] which would compete with its own affiliates, QVC and HSN.

As ValueVision has noted in its comments, first-come-first-served has been the Commission's preferred way of avoiding content-based selections since it adopted the original leased access rules in 1972. Some cable commenters rely extensively on

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[92] See 47 U.S.C. § 532(c)(2).

[93] Moreover, we urge the Commission to require operators to respond to leased access requests within 7 days. We find it particularly ironic that Armstrong and Intermedia jointly argue that a 7-day period is overly burdensome on cable operators, since neither party has provided ValueVision with its rates within any amount of time. Intermedia failed to respond to all four of ValueVision's inquiries for leased access rate information, which were sent in May 1993, November 1993, May 1995, and November 1995. ValueVision originally requested rate information from Armstrong in April 1993 but received no response. After receiving a second such request in November 1993, Armstrong responded by asking what type of programming ValueVision provides (although ValueVision's first letter had made the answer to this question clear) and refusing to provide the number of subscribers on their systems. Armstrong did not respond to ValueVision's letter answering its questions or to two subsequent letters.

[94] TCI at 25-26.

§ 621(c) of the 1984 Act, which states that "[a]ny cable system shall not be subject to regulation as a common carrier . . . by reason of providing any cable service." 47 U.S.C. § 541(c) (emphasis added).[95] To the very limited extent of 10 to 15% of their activated channel capacity, however, cable operators are not providing a cable service. In FCC v. Midwest Video Corp., 440 U.S. 689, 700-01 (1978), the Supreme Court held that "[e]ffectively, the Commission ha[d] relegated cable systems, pro tanto, to common-carrier status."[96] In rejecting the Commission's first leased access rules, the Court held that the "authority to compel cable operators to provide common carriage of public-originated transmissions must come specifically from Congress." Id. at 709. With certain specific modifications not relevant here, Congress provided that authority in 1984 when it added § 612 to the Act.

IX. ALLOWING RESALE WOULD FACILITATE THE DEVELOPMENT OF LEASED ACCESS AND INCREASE PROGRAMMING DIVERSITY.

Many cable operators urge the Commission to prohibit resale, in order to further limit the availability of leased access.[97] NCTA argues that "[r]esale is a concept arising in

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[95] See e.g. Cable Television Operators at 17; Eternal Word at 4-6; Travel Channel at 23-24.

[96] See Midwest Video Corp, 440 U.S. at 701 n.9 (holding that "[a] cable system may operate as a common carrier with respect to a portion of its service only").

[97] See, e.g., Comcast at 22-23; Cox at 30-32; NCTA at 33-34.

the telephone context -- under circumstances that are inapplicable" in the cable industry.[98] To the contrary, just as resale has proved an effective way to inject competition into the telecommunications market, which was dominated by bottleneck monopoly providers, resale would similarly encourage competition in the cable programming market, which remains similarly dominated. Indeed, resale may be the only financially feasible means by which small unaffiliated programmers can avail themselves of leased access time. By pooling their resources to gain access, such programmers would contribute to the diversity of programming sources on cable networks.[99]

Resale would facilitate the development of what the Commission, in its 1990 Report, called "channel brokers" -- entities that would accumulate leased access channels and sublease them in groups to programming services.[100] As the Commission explained, "[t]hese brokers could then provide program services with access to subscribers, independent of cable operators and with reduced transaction costs." Id. Allowing such brokers would facilitate national carriage for leased access

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[98] NCTA at 33-34.

[99] While CME is concerned that "resale presents an opportunity for lessees to circumvent the maximum reasonable rates" (CME at 28-29), we believe that resellers unaffiliated with cable operators would have little incentive to resell capacity at unaffordable rates.

[100] 1990 Report, 5 FCC Rcd at 5050.

programmers, helping leased access programmers to attain sufficient carriage to be economically viable[101/] and defraying the expense of negotiating leased access agreements.

In effect, cable operators want to limit the ability of resellers to do on 10-15% of the channels what operators and programmers themselves already do on all of these channels -- package programming. Much like existing cable networks that defray expenses by leasing significant parts of their schedule, leased access programmers may find it economically feasible to resell some portion of their channel time. Acting in their own economic interest, incumbent programmers are opposing resale in an effort to create a further obstacle for such leased access programmers to obtain a "genuine outlet" for their programming. The Commission should adopt here the same pro-competitive policy favoring resale that it has adopted in any other context in which no competitive service yet exists.

Conclusion

For the foregoing reasons, and with the modifications stated herein and in its opening comments, ValueVision urges the

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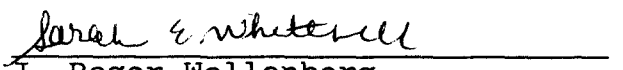
101/ See Outdoor Channel at 22-24 (explaining that wide distribution is essential to the success of new programming networks).

Commission promptly to adopt its tentative proposals in this docket.

Respectfully submitted,



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May 31, 1996

CERTIFICATE OF SERVICE

I, Sarah E. Whitesell, hereby certify that on this 31st day of May, 1996, I caused copies of the foregoing "Reply Comments of ValueVision International, Inc." to be delivered by first-class mail (except as noted) as shown on the attached Service List.

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